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LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS IN *ULTRA VIRES* UNDERTAKINGS. — The rule of *respondeat superior*, in so far as it is affected by the doctrine of *ultra vires*, is more restricted in its application to municipal than to private corporations. As with a private corporation, the mere fact that a city is never authorized to commit a tort does not relieve it of liability for the wrongful acts of its agents; and where such an act is done in the course of an authorized undertaking, a municipal corporation is liable,<sup>1</sup> subject to the doctrine of governmental functions.<sup>2</sup> Nor is it a defense that the conduct of the project is beyond the powers of the particular officers,<sup>3</sup> or that certain formalities were omitted,<sup>4</sup> as long as the project itself is *intra vires* the corporation. If, however, the whole undertaking is *ultra vires*, this bars any action for a tort committed by persons therein employed, and no amount of acquiescence can extinguish the right to maintain this defense.<sup>5</sup> This strict doctrine is illustrated in a recent case. *City of Radford v. Clark*, 73 S. E. 571 (Va.). A contrary doctrine has been asserted in several cases where the *ultra vires* act resulted in obstructing the highway.<sup>6</sup> The liability, however, of the municipality might be based on the breach of the city's undoubted duty to maintain its streets in a safe condition,<sup>7</sup> and therefore these cases cannot be regarded as authorities opposed to the universal rule of non-liability for torts committed in an *ultra vires* undertaking.<sup>8</sup>

The underlying principle of this strict doctrine may be more easily ascertained by considering the law as respects the *ultra vires* contracts of municipal corporations. Here, too, the doctrine is far stricter than that applied to private corporations.<sup>9</sup> The *ultra vires* contracts of a city are generally void and incapable of ratification.<sup>10</sup> Yet, in some few cases, when substantial benefits have accrued to either party, the law gives effect to the *ultra vires* acts of the corporate officers. Where the fact upon which depends the authority to borrow money is not easily ascertainable by the outsider,<sup>11</sup> or the money borrowed has been received into the city treasury and applied to corporate uses,<sup>12</sup> the city is bound

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Surrey County Council, [1900] 2 K. B. 763 (school playground); *Carey v. Kansas City*, 187 Mo. 715, 86 S. W. 438 (park); *City of Denver v. Spencer*, 34 Colo. 276, 82 Pac. 590 (park); *City of Denver v. Davis*, 37 Colo. 370, 86 Pac. 1027 (garbage dump); *Quill v. Mayor, etc. of New York*, 36 N. Y. App. Div. 476, 55 N. Y. Supp. 889 (garbage wagon); *Missano v. Mayor, etc. of New York*, 160 N. Y. 123, 54 N. E. 744 (garbage wagon).

<sup>1</sup> *Missano v. Mayor, etc. of New York*, 160 N. Y. 123, 54 N. E. 744.

<sup>2</sup> *Elliott v. City of Philadelphia*, 75 Pa. St. 347.

<sup>3</sup> *Norton v. City of New Bedford*, 166 Mass. 48, 43 N. E. 1034.

<sup>4</sup> *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486.

<sup>5</sup> *Cooper v. Mayor, etc. of Athens*, 53 Ga. 638; *Horn v. Mayor, etc. of Baltimore*, 30 Md. 218; *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291.

<sup>6</sup> *Cohen v. Mayor, etc. of New York*, 113 N. Y. 532, 21 N. E. 700; *Stanley v. City of Davenport*, 54 Ia. 463, 2 N. W. 1064, 6 N. W. 706; *Pettit v. Incorporated Town of Grand Junction*, 119 Ia. 352, 93 N. W. 381.

<sup>7</sup> *Bourget v. City of Cambridge*, 159 Mass. 388, 34 N. E. 455; *Koch v. City of Williamsport*, 195 Pa. St. 488, 46 Atl. 67.

<sup>8</sup> *Cf. Shinnick v. City of Marshalltown*, 137 Ia. 72, 114 N. W. 542.

<sup>9</sup> *Cf. Bissell v. Michigan Southern and Northern Indiana R. Cos.*, 22 N. Y. 258.

<sup>10</sup> *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361; *Cleveland School Furniture Co. v. City of Greenville*, 146 Ala. 559, 41 So. 862; *City of Somerville v. Dickerman*, 127 Mass. 272.

<sup>11</sup> *Hackett v. Ottawa*, 99 U. S. 86.

<sup>12</sup> *Thomson v. Town of Elton*, 109 Wis. 589, 85 N. W. 425. If a city has power to

by the acts of its officers. And, if a contract has been partly performed, an action for breach thereof may be maintained against the city, notwithstanding the consideration promised was beyond the powers of the city to give.<sup>13</sup> For the same reasons a city cannot escape liability for revenue taxes where it engages in the business of distilling and increases its assets with profits from the *ultra vires* transaction.<sup>14</sup>

Accordingly it seems clear that, within certain limits, a municipal corporation, like a private corporation,<sup>15</sup> may have agents for *ultra vires* purposes whose acts may be the foundation of legal rights and liabilities. Hence, the strict doctrine of *ultra vires*, applied to these bodies, must rest on motives of policy,<sup>16</sup> rather than on the lack of any legal principle to identify the corporation with the acts of its agents. That this policy rests on sound considerations, in its general application, seems equally clear. In contracts, the burden should be on the outsider to ascertain the corporate powers,<sup>17</sup> and in other cases the taxpayers should not bear the burdens of the unauthorized acts of their officers.<sup>18</sup> When, however, the *ultra vires* transaction is productive of some benefit, pecuniary or otherwise, which the corporation accepts, and at the same time causes an injury to some innocent individual, the policy of the law might well be altered. The same considerations are applicable by which public corporations are denied the immunity of governmental agencies when an *intra vires* act is of peculiar benefit to the inhabitants;<sup>19</sup> and, moreover, considerations of justice to the injured party might well justify in some cases the imposition of liability upon municipal corporations for torts of their agents committed in *ultra vires* undertakings.

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RES JUDICATA IN PATENT CASES. — As the circuit courts are not bound by each other's precedents,<sup>1</sup> it sometimes happens that the same patent is held invalid or not infringed by a certain device<sup>2</sup> in one circuit, and

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purchase gas, no question of *ultra vires* is raised in a suit to recover the value of gas supplied, though the contract under which it was furnished was *ultra vires*. *City of East St. Louis v. East St. Louis Gas, Light, and Coke Co.*, 98 Ill. 415.

<sup>13</sup> *Hitchcock v. Galveston*, 96 U. S. 341. It is difficult to understand the reasoning of the court, that it is enforcing the contract only in so far as it is *intra vires*. If an outsider has received benefits under an *ultra vires* contract, the city may have an action for breach thereof. *Town of Monticello v. Cohn & Kuhn*, 48 Ark. 254, 3 S. W. 30.

<sup>14</sup> *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055. Whatever bearing this case may have on *ultra vires* torts, it clearly stands for the proposition that the corporation, as such, was subject to a tax.

<sup>15</sup> See *Bissell v. Michigan Southern and Northern Indiana R. Cos.*, *supra*, 284.

<sup>16</sup> See 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1654, note 3.

<sup>17</sup> *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32; *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406.

<sup>18</sup> *Mayor, etc. of Albany v. Cunliff*, 2 N. Y. 165; *Wheeler v. Essex Public Road Board*, *supra*. See *Bradley v. Ballard*, 55 Ill. 413, 420.

<sup>19</sup> *Hourigan v. City of Norwich*, 77 Conn. 358, 59 Atl. 487; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274.

<sup>1</sup> *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708.

<sup>2</sup> It is immaterial as to the questions discussed in this note upon which ground the decree for the defendant is placed. See *Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co.*, 183 Fed. 978, 983.